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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 19

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, LOCAL 51, AFL-CIO, Charging Party, and NEXSTAR BROADCASTING GROUP, INC. d/b/a KOIN-TV, Respondent.	No. 19-CA-219985 and 19-CA-219987 **CHARGING PARTY'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

Charging Party, National Association of Broadcast Employees and Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO ("Union") hereby submits this brief to the Administrative Law Judge. These matters are before the Honorable Lisa Ross (Lisa Thompson), Administrative Law Judge, on a

Complaint alleging that Nexstar Broadcasting, Inc., d/b/a KOIN-TV ("Employer" or "Respondent") violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act") when it unilaterally changed practices within the scope of representation without giving the Union advance notice and opportunity to bargain. As discussed below, Respondent instituted a new policy to require represented employees to submit to motor vehicle/driving history background checks on their anniversary dates, whereas previously represented employees had not been required to submit to such background checks absent a motor vehicle accident on the job; and Respondent changed its schedule posting practice so that only two weeks' schedule was posted, whereas the prior practice had been to post the schedule about four months in advance.

The stipulated facts provide a plain record establishing these unilateral changes in violation of the Act. Moreover, Respondent's alleged defenses are without merit. As analyzed below, Respondent's claim that Charging Party did not timely file the charge fails, because Respondent has not shown that Charging Party was on actual or constructive notice of the unilateral changes more than six months before the charges were filed. Next, while Respondent misplaces reliance upon a "contract coverage" theory, the Board has not adopted the "contract coverage" doctrine; and it would not apply after contract expiration in any event. As to Respondent's arbitration deferral theory, it does not apply because the unilateral changes underlying the unfair labor practice charges arose after the parties' collective bargaining agreement expired.

II. STATEMENT OF FACTS

The facts in this case are set forth in the Joint Motion and Stipulation of Facts:

A. BACKGROUND

The Respondent operates a television station, KOIN-TV, in Portland, Oregon. (Stipulated Fact No. 7). The Union is the exclusive bargaining representative of the engineers, production employees, news and creative services employees, and web producers employed by the Respondent at KOIN-TV. (Stipulated Facts Nos. 15-18.) The Union was the exclusive bargaining representative of the same units employed by Media General KOIN-TV prior to

January 2017. Respondent purchased the business of Media General KOIN-TV in January 2017, and has continued to operate the business in basically unchanged form, employing former employees of Media General KOIN-TV as a majority of its employees. (Stipulated Fact No. 8.) As such, Respondent has stipulated that it is the successor to Media General KOIN-TV. (Stipulated Fact No. 9.)

The most recent collective bargaining agreement was in effect from July 29, 2015 to August 18, 2017, with the last extension expiring September 8, 2017 ("expired CBA"). (Stipulated Fact No. 16 and Exhibit G.) At all material times, Respondent and the Union were engaged in bargaining for a successor to the expired CBA. (Stipulated Fact No. 19.)

B. MOTOR VEHICLE/DRIVING HISTORY BACKGROUND CHECKS

Sometime in September 2017, Respondent adopted a new requirement that employees complete a motor vehicle/driving history background check on their anniversary date. (Stipulated Fact No. 20.) Respondent did not provide the Union with advance notice or the opportunity to bargain regarding the new requirement. (Stipulated Fact No. 21.)

Before the new policy, represented employees were neither asked nor required to complete a motor vehicle/driving history background check unless they were involved in a motor vehicle accident on the job. (Stipulated Fact No. 22.)

In September 2017, Respondent's Business Administrator Casey Wenger sent an email to various addressees, only one of whom was a member of a bargaining unit represented by the Union, and none of whom were authorized representatives or officers of the Union. (Stipulated Fact No. 23.) The email (Exhibit H) stated, "It is a Nexstar company policy to perform an annual MTR Check on those employees who drive as part of their job…" A week later, Wenger sent a follow-up email (Exhibit I) to the same addressees. (Stipulated Fact No. 24.)

On November 8, 2017, Wenger sent an email (Exhibit J) to addressees better known to Respondent (Stipulated Fact No. 25), but Respondent has not identified to whom the email was sent. Exhibit J was addressed to cwenger@koin.com (the same address as the sender) and stated, "…Once a year on your anniversary month Nexstar requires all employees that drive on

company time complete a Motor Vehicle background check..." An example of the instructions was pasted in the email. The instructions stated, "As a requirement of your continued employment, you must successfully complete a MVR (motor vehicle/driving history) check..." (Exhibit J, emphasis supplied.)

Respondent has not provided any other putative evidence of any kind of notice to any bargaining unit members earlier than six months before the Union filed the charge about the background checks (Exhibit C). The Union filed the charge on May 9, 2018 (Stipulated Fact No. 3); so six months prior to May 9, 2018 was November 9, 2017.

On about February 5, 2018, a bargaining unit employee named Douglas Key alerted Union Business Representative Carrie Biggs-Adams that when Key was logging on for work through Respondent's mobile app, a notice was generated stating that it was a requirement of employment to submit to a motor vehicle/driving history background check. (Stipulated Fact No. 29 and Exhibit N.)

On February 7, 2018, Biggs-Adams sent a letter to Respondent (Exhibit O). (Stipulated Fact No. 30.) The letter advised:

> It has come to the attention of NABET-CWA Local 51 that Nexstar and KOIN-TV have instituted a Background Check on our members. According to the screenshot that I have seen the "Background Check Request" says that it is "As a requirement of your continued employment."
>
> We do not believe that such a background check has been used in the past for current employees of KOIN-TV, irrespective of the then owner of the station. Our members object to the institution of this system and as their exclusive bargaining representative we object to the unilateral institution of this condition of employment without bargaining with us.
>
> NABET-CWA Local 51 demands that KOIN-TV and Nexstar immediately rescind this policy's application to our members, cease and desist from background checks, and notify our members that the policy's application has been rescinded. If KOIN-TV/Nexstar would like to make a proposal to apply such a policy to our members, we suggest that you do so in bargaining. Until such a proposal has been made, bargained between the parties, and the contract ratified, we do not agree to Background Checks of existing employees/members of our bargaining unit.

(Exhibit O.)

On February 12, 2018, Respondent's Vice President Pat Nevin acknowledged receipt of Biggs-Adams' letter and stated that they would "discuss your concerns regarding this policy" at their next bargaining session on February 15. (Stipulated Fact No. 32 and Exhibit P.)

On February 20, 2018, Biggs-Adams sent Respondent a letter formally demanding to bargain over the background check system and requesting information. (Stipulated Fact No. 33 and Exhibit Q.)

On March 23, 2018, Nevin sent Biggs-Adams a memorandum and attachments (Stipulated Fact No. 34 and Exhibit R), responding to the request for information but denying the duty to bargain. The response to the request for information confirmed that Respondent was requiring an annual motor vehicle/driving history background check as a condition of employment. (*Id.*)

To date, Respondent has failed and refused to rescind its policy requiring annual driving history background checks of represented employees. (Stipulated Fact No. 37.)

C. POSTING SCHEDULES

The expired CBA, Article 8.1, provided in relevant part:

> ...All work schedules, continuing hours of work and days off will be prepared and posted two (2) weeks in advance of the commencement of the workweek. The Employer will post work schedules as soon as they are known to the Employer.

(Exhibit G, p. 8, emphasis supplied.)

Since at least as early as 1993, when represented employee Ellen Hansen ("Hansen") began her employment at KOIN-TV, until the unilateral change in question, the past practice was to post the work schedules about four months in advance. (Stipulated Fact No. 43.) The past practice allowed represented employees to better manage and monitor vacation selections and work schedules. (*Id.*)

In June 2017, during bargaining with the Union, Respondent proposed to eliminate any advance schedule posting. The Union did not agree. (Stipulated Fact No. 38.)

In February 2018, Respondent changed how it posted represented employees' work schedules by posting the schedules two weeks in advance, rather than continuing its past practice of posting about four months in advance. (Stipulated Fact No. 39.) Respondent did not provide the Union with advance notice or the opportunity to bargain regarding the change in how it posted represented employees' work schedules. (Stipulated Fact No. 40.)

On February 19, 2018, Hansen sent an email to Respondent's Assistant Director of Technical Operations, Dean Barron ("Barron") (Stipulated Fact No. 41 and Exhibit T), asking:

> Any reason schedules are not posted more than 2 weeks out? How can I find out if a date is clear for vacation? I can't even see if the dates I have requested are there. Thanks!

(Exhibit T.) Barron replied by the email with handwritten notes by Hansen, Exhibit U, in which Barron advised that Respondent changed how it posted employees' work schedules by posting the schedules two weeks in advance, rather than continuing its past practice of posting four months in advance. (Stipulated Fact No. 42 and Exhibit U.)

III. LEGAL ANALYSIS

A. THE EVIDENCE PLAINLY DEMONSTRATES THAT RESPONDENT ENGAGED IN UNILATERAL CHANGES IN MATTERS WITHIN THE SCOPE OF REPRESENTATION WITHOUT BARGAINING

1. Annual driving history background checks

Respondent unilaterally adopted and implemented a policy that represented employees must submit to annual driving history background checks as a "condition of employment." (Stipulated Facts Nos. 29, 35, Exhibits N, R.) Mandatory subjects of bargaining include conditions of employment. (Section 8(d) of the Act.) Thus, for example, the Board has long treated a drug and alcohol testing requirement for current employees as a condition of employment within the meaning of the Act. (*Delta Tube & Fabricating Corp.,* 323 NLRB 856, 857 (1997).) Moreover, the Board has held that a requirement that employees submit to random drug or alcohol testing is a "distinctly different condition of employment" from accident-based testing or reasonable-suspicion-based testing, so that it is a violation of the Act to unilaterally

implement random testing without bargaining where previously only accident-based or reasonable-suspicion-based testing had been negotiated. (*Id.*)

So too, the condition of employment that represented employees must submit to annual motor vehicle/driving history background checks is a mandatory subject of bargaining, and it is a distinctly different condition from the prior practice of requiring only accident-based background checks. (See Stipulated Fact No. 22.)

2. Posting schedules two weeks in advance instead of four months in advance

It is undisputed that in February 2018, Respondent unilaterally changed its policy and practice of posting work schedules by posting the schedules two weeks in advance, rather than continuing its past practice of posting about four months in advance. (Stipulated Fact No. 39.)

Mandatory subjects of bargaining include topics that relate to "hours" of work. For example, the Board has found shift scheduling and overtime scheduling to be mandatory subjects of bargaining because they relate to hours of work. *Carbonex Coal Co.,* 262 NLRB 1306 (1982), *Equitable Resources Exploration*, 307 NLRB 730 (1992). Similarly, a college violated the Act when it unilaterally changed its past practice of conferring with faculty employees before publishing class schedules for the next school term, because even if employees were required to spend a certain *number* of hours on campus without regard to the time classes were taught, the term "hours" encompassed the question of *when* the employees would report to work; moreover, the past use of a process for accommodating scheduling preferences indicated recognition by the employer that the class schedule was a term and condition of employment. *Kendall College*, 228 NLRB 1083, 1087 (1997). It is also well-accepted that the duty to bargain over hours includes bargaining over time off. See, e.g., *Verizon New York*, 339 NLRB 30 (2003) (violation of the Act to unilaterally discontinue past practice of allowing employees to take off work with pay to donate blood); *Pepsi America, Inc.*, 339 NLRB 986 (2003) (violation of the Act to unilaterally eliminate the earning of credits for good attendance that could be used for future paid time off).

Here, Respondent substantially altered the process of work scheduling and vacation scheduling. Under the past practice of posting the schedules four months in advance, represented

employees could manage and monitor their vacation selections and work schedules by viewing what dates they were scheduled to work, what dates were available for vacation requests, and what dates they and their co-employees requested to take off. (Stipulated Fact No. 43, and see Exhibit T.) Being able to view and plan one's schedule only two weeks in advance, instead of four months in advance, was a dramatic change. The parties' expired contract reflects that, similar to common experience, vacations are planned and requested well more than two weeks in advance, and principles of seniority and first-come-first-served would come into play depending on the timing of the requests (see Article 17.3 in Exhibit G, p. 24). As Respondent changed past practice, posting only two weeks' schedule, Ms. Hansen questioned how she would know whether a date is clear for vacation, and noted that she could not see the dates requested. (Exhibit T.) Management responded that she could consult a vacation sign-up sheet where employees were supposed to mark approved vacation dates on a calendar once the dates had been approved by their supervisors (Exhibit U). But that was not responsive to the concerns Ms. Hansen had expressed in Exhibit T; such a calendar would not allow her to see the work schedule, nor to monitor what dates she and other employees requested. The difference between the new practice of posting schedules only two weeks in advance, compared with the past practice of posting schedules four months in advance, was more than a matter of convenience; it affected employees' ability to manage their schedule plans and to monitor whether vacation requests were being processed fairly.

Moreover, it is undisputed that in June 2017, during bargaining, Respondent proposed to eliminate advance schedule posting, and the Union did not agree. (Stipulated Fact No. 38.) By making the proposal, Respondent implicitly acknowledged that advance schedule posting either affected hours or was otherwise a term of employment within the scope of representation. If Respondent had believed it already had a right to unilaterally eliminate advance schedule posting, it is unlikely that Respondent would have made the proposal. But instead of continuing to pursue the bargaining process after the Union declined that proposal, Respondent improperly engaged in self-help by unilaterally changing its practice.

B. RESPONDENT HAS NOT SHOWN THAT CHARGING PARTY WAS ON ACTUAL OR CONSTRUCTIVE NOTICE OF THE UNILATERAL CHANGES MORE THAN SIX MONTHS BEFORE THE CHARGES WERE FILED

1. The change in the schedule posting practice (Case No. 219985) occurred within six months before the filing of the charge.

The charge in Case No. 219985 was filed on May 9, 2018 (Stipulated Fact No. 1 and Exhibit A). The parties stipulated that the change in schedule posting practice occurred in February 2018 (Stipulated Fact No. 39). Therefore, the charge is not time-barred.

2. Respondent has not shown that Charging Party had actual or constructive notice of the requirement that employees complete a motor vehicle/driving history background check on their anniversary dates (Case No. 219987) more than six months before the charge was filed.

The charge in Case No. 219987, regarding the unilateral new requirement of driving background checks, was filed on May 9, 2018 (Stipulated Fact No. 3 and Exhibit C). Six months prior to May 9, 2018 was November 9, 2017.

The limitations period under section 10(b) of the Act begins to run only when a party has "clear and unequivocal" notice of the violation of the Act. *M&M Automotive Group, Inc.*, 342 NLRB 1244, 1246 (2004). The burden of showing that a charge is time-barred is on the party raising the limitations period as an affirmative defense. *Chinese America Planning Council*, 307 NLRB 410 (1992). The party asserting the defense must show that the conduct in question was sufficiently open and obvious to provide clear notice or that the filing party would have discovered the conduct in question had it exercised reasonable or due diligence. *M&M Automotive Group, Inc., supra.*

Respondent does not claim it gave actual notice to any authorized representative of the Union when it adopted a policy to require employees to submit to annual driving history background checks. (Stipulated Fact Nos. 21, 23.)

Nor does the evidence support constructive notice. Respondent misplaces reliance upon Exhibits H, I, and J.[1] It is undisputed that only one of the addressees of the September 21, 2017

[1] The other emails in the record about the driving record checks occurred later than November 9, 2017.

email, Exhibit H, was a member of the bargaining unit represented by the Union. (Stipulated Fact No. 23.) There is no evidence that any representative or officer of the Union had any reason to know about the email at the time. The September 27, 2017 follow-up email, Exhibit I, was sent to the same addressees (Stipulated Fact No. 24), and again there is no evidence that any representative or officer of the Union had any reason to know about the email at the time. The November 8, 2017 email, Exhibit J, does not list the addressees. While it was sent to "recipients better known to Respondent" (Stipulation No. 25), Respondent has not demonstrated how many bargaining unit members received the email, if any; nor has Respondent provided any evidence that a representative or officer of the Union had any reason to know about the email at the time.

Obviously, Respondent has not met its burden of proof, and the charge is not time-barred.

C. THE DUTY TO BARGAIN WAS NOT SUSPENDED OR WAIVED

Respondent's putative defense, that the changes were lawful because allegedly the "collective bargaining agreement covered the topics, the Union had waived bargaining over the topics, or the changes made were consistent with the agreement" (Respondent's Position, section 2), is without merit.

1. The Board has not adopted the "contract coverage" doctrine, and in any event it would not apply after contract expiration

First, Respondent misplaces reliance upon the "contract coverage" doctrine, which the Board has not adopted. Under well-established Board law, a waiver of the statutory right to bargain will not be readily inferred; instead, waiver of a statutory right must be clear and unmistakable. *E.g.*, *Metropolitan Edison Co. v. NLRB* 460 U.S. 693, 708 (1983) (endorsing the Board's "clear and unmistakable" waiver standard); *Johnson-Bateman Co.*, 295 NLRB 180, 184-185 (1989); *Georgia Power Co.*, 325 NLRB 420 (1998); *Provena Hospitals d/b/a Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). The Board has rejected the so-called "contract coverage" approach advocated by Respondent -- in which a duty to bargain terms "covered" by a management rights clause is putatively negated without a clear and unmistakable waiver, on the basis that a union has "exercised" its bargaining right – as noted in *Provena Hospitals*, *supra*:

> Changing to a "contract-coverage" standard would very likely complicate the collective-bargaining process and increase the likelihood of labor disputes. The waiver standard, on the other hand, effectively requires the parties to focus on particular subjects over which the employer seeks the right to act unilaterally. Such a narrow focus has two clear benefits. First, it encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining. Second, if a waiver is won—in clear and unmistakable language—the employer's right to take future unilateral action should be apparent to all concerned. A "contract-coverage" standard, in contrast, creates an incentive for employers to seek contractual language that might be construed as authorizing unilateral action on subjects of no present concern, requires unions to be wary of agreeing to such provisions, and invites future disputes about the scope of the contractual provision. (350 NLRB at 813-814.)

Moreover, a "contract coverage" doctrine would not negate a duty to bargain after contract expiration. Whether judged by a "waiver" standard or "contract coverage" standard, a suspension of the duty to bargain as to terms embodied in a collective bargaining agreement ends at the time of contract expiration. See, e.g., *Ironton Publications, Inc.,* 321 NLRB 1048 (1996); *Buck Creek Coal*, 310 NLRB 1240, fn. 1 (1993); *Holiday Inn of Victorville*, 284 NLRB 916 (1987). It is well established that when a collective bargaining agreement expires, any management rights clause or zipper clause it contains is no longer effective. See, e.g., *Buck Creek Coal, supra; Holiday Inn of Victorville, supra*; *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991).

In Respondent's motion for summary judgment[2], Respondent misplaced reliance upon *Quebecor World Mt. Morris II*, 353 NLRB 1 (2008), which is readily distinguishable because in that case, Quebecor and Teamsters Local 65-B had orally agreed, without qualification, to extend the collective bargaining agreement while they negotiated a successor contract, including the time when the alleged unfair labor practice arose in that case – which is not so here.

The last extension of the CBA expired on September 8, 2017. (Stipulated Fact No. 16.) With respect to Case No. 219987, Respondent states that it adopted a policy to require motor vehicle/driving history background checks on employees' anniversary dates sometime in

[2] Respondent's motion for summary judgment was denied on December 17, 2018 due to the existence of questions of fact.

September 2017, but Respondent does not specifically claim that it occurred when the contract was in effect. (See Stipulated Fact No. 20.) With respect to Case No. 219985, the change in schedule posting practice occurred in February 2018. The unilateral changes underlying the two consolidated charges in this case occurred after contract expiration. If a CBA suspends a duty to bargain "covered" topics under contract coverage theory, nevertheless such suspension would end upon contract expiration. Therefore, there is no reason for the Board to consider whether to adopt the contract coverage doctrine in this case.

2. Charging Party did not waive bargaining over the topics in question at any relevant time

As discussed above, a waiver of a duty to bargain terms governed by a collective bargaining agreement would not outlive the collective bargaining agreement. See, e.g., *Ironton Publications, supra; Buck Creek Coal, supra; Holiday Inn of Victorville, supra.* Since the unilateral changes took place after the CBA expired, the expired CBA cannot be said to have waived the duty to bargain.[3] Nor is there any evidence of any other kind of waiver of the duty to bargain about driving background checks or schedule posting practices in effect at the time of the unilateral changes.

3. The changes were not "consistent with the agreement."

a. There was no agreement that Respondent could require annual driving record background checks

There is no provision of the expired CBA providing for driving history background checks. While Respondent misplaces reliance upon Article 10.1 (Exhibit G, p. 11), it contains no mention whatsoever of background checks, and there is no evidence that the Vehicle Use Policy to which Article 10.1 refers provided for background checks when the parties agreed to the expired CBA.

Again, there is no dispute that the requirement of annual driving history background checks was new, and that prior to the new policy, represented employees were neither asked nor

[3] The Union does not concede that the CBA would have waived bargaining regarding the changes if the CBA had not expired, but it is not necessary to decide such a hypothetical question, since it is undisputed that the CBA had expired.

required to complete a motor vehicle/driving history background check unless they were involved in a motor vehicle accident on the job. (Stipulated Fact No. 22.)

To the extent that Respondent misplaces reliance upon the very absence of a provision in the expired CBA governing background checks, Respondent is mistaken. There is no authority for the notion that the lack of a provision regarding a practice in an expired CBA provides an employer with a license to unilaterally change that practice without bargaining.

b. The Union did not agree that Respondent had a right to unilaterally change the practice of posting schedules from four months to two weeks.

With respect to the posting of work schedules, Respondent misplaces reliance upon Article 8.1, but that provision has not authorized Respondent to post schedules only two weeks in advance where Respondent knows the schedule more than two weeks in advance. The last sentence of that provision states, "The Employer will post work schedules as soon as they are known to the Employer." (Exhibit G, p. 8.) Harmonizing that sentence with the one before it, in the expired CBA, the parties agreed that Respondent must post work schedules at least two weeks in advance, but it must post work schedules as soon as "known," earlier than two weeks in advance if known earlier. Respondent's past practice of posting the schedules four months in advance – in which employees could see their work schedules, available dates for vacation requests, and dates that had been requested for vacation – exhibits the parties' understanding of how Article 8.1 was interpreted and implemented. They mutually understood the phrase "as soon as [the work schedules] are known to the Employer" to refer to the reasonably anticipated operational staffing needs, generally planned over the next quarter -- not that Respondent would needlessly withhold all but the next two weeks' schedule. Respondent has not provided any evidence that it does not "know" the work schedule more than two weeks in advance within the meaning of Article 8.1.

Thus, the Union did not agree that Respondent had a right to change is practice from posting four months' schedule to posting only two weeks' schedule, despite being able to continue posting four months' schedule. During the term of the contract, if Respondent had

unilaterally changed its practice at that time, the Union would have considered it a contract violation that could have been addressed through the grievance procedure. Since Respondent unilaterally changed its practice after contract expiration, Charging Party is not required to submit the dispute to arbitration (see legal authorities in part D of this brief below).

D. DEFERRAL IS NOT AUTHORIZED BECAUSE THE CONTRACT WAS NOT IN EFFECT WHEN THE UNFAIR LABOR PRACTICES AROSE

Compulsory arbitration deferral is not authorized here because the events giving rise to the charges arose after the contract had expired. Deferral requires a collective bargaining agreement to be actually in effect, not expired. E.g., *W.H. Froh, Inc.*, 310 NLRB 384 (1993); *Big Track Coal Co.*, 300 NLRB 951 (1990). This is because a party to an expired collective bargaining agreement does not have a contractual obligation to adhere to the agreement's arbitration procedure in processing grievances arising after the agreement's expiration date. *W.H. Froh, Inc.*, *supra*, citing *Hilton-Davis Chemical Co., a Division of Sterling Drug, Inc.*, 185 NLRB 241 (1970) and *Litton Financial Printing, supra.*

While Respondent misplaces reliance upon *Litton*, the disputes in this case arose after the contract had expired.[4] (See summary of dates with citations to the record in part C.1 of this brief above.) The Union does not have a duty to arbitrate.

IV. REMEDIES

The Union seeks a recommended order requiring Respondent to cease and desist from its unlawful conduct, rescind the unilateral changes, restore posting of four months' schedules, notify represented employees that the motor vehicle/driving history background checks policy is rescinded, and if Respondent seeks to require driving history background checks or reduce the advance posting of schedules, Respondent shall first make a proposal to the Union and bargain in good faith, and shall not implement a change unless and until good-faith bargaining is exhausted. The remedy should also include the following:

[4] Moreover, with respect to Case No. 219987, the expired CBA did not include a provision regarding background checks.

As the normal and customary practice for represented employees to receive announcements from Respondent is by email and at monthly staff meetings, Respondent should be required to give notice of the Order using both of those methods;

Respondent should be required to post permanently the Board's employee rights notice. https://www.nlrb.gov/poster. The Courts that invalidated the rule noted that such a notice could be part of a remedy for specific unfair labor practices. It is time for the Board to impose the requirement for a lengthy posting of that notice as a remedy for unfair labor practices.

Additionally, any notice that is posted should be posted for the period of time from when the violation began until the notice is posted. The short period of sixty (60) days only encourages employers to delay proceedings, because the notice posting will be so short and so far in the future.

The Notice should be included with any payroll statements. *See* Cal. Lab. Code § 226.

The Board's Notice and the Decision of the Board should be mailed to all employees. Simply posting the notice without further explanation of what occurred in the proceedings is not adequate notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

Notice reading should be required in this matter. That Notice reading should require that a Board Agent read the Notice and allow employees to inquire as to the scope of the remedy and the effect of the remedy. Simply reading a Notice without explanation is inadequate. Behaviorists have noted that, "[t]aken by itself, face-to-face communication has a greater impact than any other single medium." Research suggests that this opportunity for face-to-face, two-way communication is vital to effective transmission of the intended message, as it "clarifies ambiguities, and increases the probability that the sender and the receiver are connecting appropriately." Accordingly, a case study of over five hundred NLRB cases, commissioned by the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending "providing an opportunity on company time and property for a Board Agent to read the Board Notice to all employees and to answer their questions." The employer should not be present.

The Union should be notified and allowed to be present. This should be on work time and paid. If the employees are working piece rate, the rate of pay should be equal to their highest rate of pay to avoid any disincentive to attend the reading.

The traditional notice is also inadequate. The standard Board notice should contain an affirmative statement of the unlawful conduct. We suggest the following:

> We have been found to have violated the National Labor Relations Act. We illegally implemented changes in matters affecting hours and terms and conditions of employment without providing the Union with advance notice and opportunity to bargain. We apologize. We have now been ordered to rescind the DMV background checks policy, and to restore the past practice of posting four months' schedules. We ask your forgiveness for violating the National Labor Relations Act.

Absent some affirmative statement of the unlawful conduct, the employees will not understand the arcane language of the notice. Nor is the notice sufficient without such an admission. In effect, the way the notice is framed is the equivalent of a statement that the employer will not do specified conduct, not an admission or recognition that it did anything wrong to begin with.

The Notice should be incorporated on any company screensavers or opening windows or screens for all computers for the length of the posting period.

The Notice should require that the person signing the notice have his or her name on the notice. This avoids the common practice where someone scrawls a name to avoid being identified with the notice, and the employees have no idea who signed it.

The employees should be allowed work time to read the Board's Decision and Notice. To require that they read the Notice, whether by email, on the wall or at home, on their own time is to punish them for their employer's misdeeds.

The Notice should be read to employees by a Board agent outside the presence of management. Representatives of the Charging Party should be present. Employees should be allowed to ask questions.

V. CONCLUSION

The undisputed facts establish that Respondent has implemented unilateral changes in matters within the scope of mandatory bargaining, in violation of section 8(a)(5) of the Act; and Respondent's affirmative defenses lack merit. The Administrative Law Judge should order the remedies sought by the Union.

Dated: February 6, 2019

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: ANNE I. YEN

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 7, 2019, I served the following documents in the manner described below:

CHARGING PARTY'S BRIEF TO THE ALJ

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from mpiro@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Ronald K. Hooks
Regional Director
National Labor Relations Board, Region 19
Email: Ronald.hooks@nlrb.gov

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KOIN-TV

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 7, 2019, at Alameda, California.

Mary Piro